ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick And Choose"	)	CC Docket No. 01-117

COMMENTS OF WORLDCOM, INC.

WorldCom, Inc. ("WorldCom"), hereby files its comments on the above-captioned Petition filed by Mpower Communications Corporation ("Mpower").[1] WorldCom opposes Mpower's proposal and urges the Commission to deny the Petition.

Mpower's proposal of a new flexible contract mechanism or "FLEX Contract," which allegedly would encourage incumbent local exchange carriers ("LECs") and competitive LECs to negotiate wholesale package deals is unsupportable. According to Mpower, any similarly situated carrier could opt-in on a fair and nondiscriminatory basis pursuant to section 252(i) of the Communications Act of 1934, as amended (the "Act"). However, requesting carriers could only opt-in to the entire agreement and could not pick and choose selected provisions as currently provided for in section 252(i). Further, Mpower asks the Commission to waive rights and obligations that it has no authority to waive. Mpower does not even explain how the current rules are inadequate to encourage incumbent and competitive LECs from voluntarily negotiating wholesale agreements. Because continued enforcement of section 252(i) remains necessary to promote

[1] Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick and Choose," CC Docket No. 01-117 (filed May 25, 2001) (the "Petition").

competition and protect consumers, WorldCom urges the Commission to deny the Petition.

I. Mpower's Request for Forbearance of Section 252(i) Does Not Meet the Requirements of Section 10 of the Act.

Section 10 of the Act only authorizes the Commission to forbear enforcement of provisions of the Act if the Commission determines that (1) enforcement of a provision is no longer necessary to ensure that a carrier's practices are just, reasonable, and nondiscriminatory; (2) enforcement of such provision is not necessary to protect consumers; and (3) forbearance is in the public interest. In this instance, the Commission cannot make any of these determinations in the affirmative.

Continued enforcement of section 252(i) of the Act is necessary to ensure that incumbent LECs' charges and practices with respect to negotiating interconnection agreements with competitive LECs are just, reasonable and nondiscriminatory. Mpower's Petition would give incumbent LECs the power over competing providers that Congress and the Commission intended to limit.

Mpower's reasoning is faulty when it claims that, because any similarly situated competitive LEC would be able to opt into FLEX contracts, these agreements would be free from unjust and unreasonable discrimination. If competitive LECs were only permitted to adopt FLEX contracts in their entirety, incumbent LECs would have tremendous bargaining power. If incumbent LECs only had to make FLEX contracts available in their entirety, this could encourage incumbent LECs to insert into agreements onerous, highly unfavorable terms, or "poison pills," for a service or element that the original carrier does not need. This would discourage other carriers from making the

same request under that agreement. For example, incumbent LECs 1) could link contracts to noncompete provisions, 2) could contract on more favorable terms with companies that do not want elements necessary to compete in certain segments (e.g., conditioned loops to provide xDSL service in competition with incumbent LECs), or 3) could link several favorable terms in a contract with a provision that only one particular company could meet – a provision that no other company could or would want to take (e.g., a very high minimum usage requirement). Indeed, under Mpower's proposal, an incumbent LEC could offer extremely favorable terms to its affiliates – perhaps by bundling the terms with management contracts. These are precisely the abusive uses of incumbent LEC bargaining power that Congress sought to prevent. The Commission's current rules implementing section 252(i) are designed to limit the ability of incumbent LECs to insert poison pills into contracts by requiring incumbent LECs, where necessary, to prove to state commissions that certain provisions are legitimately related to the network element sought.[2] Few competing carriers would be willing to elect an entire agreement that would not reflect their costs and the specific technical characteristics of their networks or would not be consistent with their business plans, requiring requesting carriers to elect an entire agreement would effectively eviscerate the obligation Congress imposed in section 252(i).

The whole purpose behind section 252(i) of the Act is to limit the number of interconnection agreements that are suitable for only one company. Avoiding the

[2] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 16139 ¶ 1315 (1999) (the Commission determined that "[g]iven the primary purpose of section 252(i) of preventing discrimination, we require incumbent LECs seeking to require a third party agree to certain terms and conditions to exercise its rights under section 252(i) to prove to the

requirements of section 252(i) would encourage incumbent LECs to create contracts that cannot be parsed out. This would work to the detriment of competition. Section 252(i) mandates that incumbent LECs make available any interconnection, service, or network element provided under an agreement approved under section 252 to which the incumbent LEC is a party to any other requesting carrier upon the same terms and conditions as those provided in the agreement. The Commission correctly observed that section 252(i) seemed to be a primary tool of the Act for preventing discrimination. The Commission has recognized that "[u]nbundled access to agreement provisions will enable smaller carriers who lack bargaining power to obtain favorable terms and conditions negotiated by large [interexchange carriers], and speed the emergence of robust competition."[3] Mpower's proposal directly contravenes these nondiscriminatory principles. Consequently, pursuant to section 10, continued enforcement of section 252(i) in this instance is necessary to ensure that a carrier's practices are just, reasonable and nondiscriminatory.

Before adopting a new regulatory regime, the Commission would need to assess whether the current process was meeting the Act's goals. Mpower has not explained how section 252(i) and the Commission's implementing rules do not currently allow parties the flexibility to voluntarily negotiate wholesale agreements. As Mpower noted, parties are currently free to negotiate interconnection agreements without regard to the standards set forth in section 251. 47 U.S.C. § 252(a). Section 252(i) and the Commission's implementing rules were enacted and adopted to protect consumers and emerging

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state commission that the terms and conditions were legitimately related to the purchase of the individual element being sought.").

[3] Id., ¶ 1313.

competition. Essentially, under Mpower's proposal incumbent LECs would have the ability to use the market power that they currently have to discriminate against competitors. In the long run, Mpower's proposal could allow incumbent LECs to prevent competition in certain markets and even shape the development of competitive companies.

In light of the foregoing, enforcement of section 252(i) remains in the public interest and is necessary to protect consumers. When competitive LECs can negotiate interconnection agreements that meet their business plans and technical requirements, consumers will ultimately reap the benefits.

II. The Commission Cannot Waive Enforcement of Section 252(e)

Mpower asks the Commission to do the impossible: waive obligations imposed on this Commission and state commissions. Mpower Petition at 14. Mpower cites to no authority that would empower the Commission to waive third parties' rights or to waive its own obligations under the Act. This request is beyond the scope of the Commission's authority and the statute itself.

Section 10 does not authorize the Commission to waive statutory obligations of the state commissions or this Commission. Specifically, section 10 permits the Commission to "forbear from applying any regulation or any provision of this Act to a *telecommunications carrier* or *telecommunications service*, . . ." 47 U.S.C. § 10(a) (emphasis added). Section 252(e) clearly requires state commissions to approve any interconnection agreement either reached through voluntary negotiations or arbitration. Congress's intent that interconnection agreements be reviewed and approved is further evidenced by section 252(e)(5), which mandates that this Commission issue an order

preempting the state commission's jurisdiction where the state commission fails to act in any proceeding initiated pursuant to section 252(e). On its face therefore, section 252(e) imposes affirmative obligations on the state commissions and, in the alternative, this Commission, which is why section 252(e) cannot be waived by the Commission.

Assuming arguendo that the Commission had authority to waive its and the state commissions' obligations under section 252(e), which it does not, WorldCom disagrees with Mpower's claim that there would be no need for Commission (or state commission) approval or for the filing of FLEX contracts with the Commission (or state commission). Mpower Petition at 15. Mpower's attempt to eliminate the role of the state commissions, and with it, any review of FLEX contracts directly contravenes Congressional intent. Prior approval of interconnection agreements by a regulatory body is central to the operation of sections 251 and 252 of the Act.

It is instructive to examine why Mpower would seek a complete waiver of section 252(e) of the Act. If Mpower's proposal is adopted and incumbent LECs are allowed to enter into special deals not subject to section 252(i), then it would be critical that a state commission investigate during the section 252(e) approval process whether the agreements are discriminatory. Indeed, it is only the filing of an agreement under section 252(e) that triggers such an investigation and the public disclosure provision of section 252(h). Absent these requirements, the agreements reached between incumbent LECs and their favored competitive LECs would escape scrutiny.

Agreements, or portions thereof, are only eligible for adoption pursuant to section 252(i) after the terms and conditions have been approved by a state commission or this Commission. By proposing that FLEX contracts be subject to only a cursory review at

best by this Commission, Mpower would eliminate one of section 252's key protections against incumbent LEC abuse of their negotiating power. The Commission interpreted section 252(i) to mean that "any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and *approved by*, the state commission.[4] Review and approval by the state commissions, or the Commission, was intended to prevent discrimination by the incumbent LEC.

CONCLUSION

For the foregoing reasons, WorldCom urges the Commission to deny the Petition. Mpower cannot affirmatively meet the requirements of section 10 and, accordingly, forbearance cannot be granted in this instance.

Respectfully submitted,

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Dated: July 3, 2001

[4] Id. at para. 1316.

Certificate of Service

I, Lonzena Rogers, hereby certify, that on this third day of July, 2001, I have caused a true and correct copy Comments of WorldCom, Inc.'s in the matter of CC Docket No. 01-117 to be served by United States Postal Service first class mail, facsimile, and hand delivery on the following:

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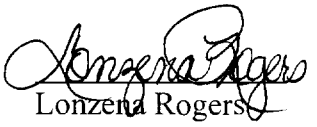
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